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MORMONISM EXPOSED.

The Constitution and the Territories.

A LAWYER'S VIEW.

By RICHARD W. YOUNG, ESQ.,

OF NEW YORK.

1885

THE

CONSTITUTION AND THE TERRITORIES.

At the time of the adoption of the Constitution, the territory of the United States included the thirteen colonies and those districts west of the Alleghanies which have since been admitted as States into the Union, under the names of Ohio, Indiana, Illinois, Michigan, and Wisconsin. Provisional governments had been extended over this western territory by the Congress of the old confederation in the ordinance of 1787. Among the first acts of the government under the existing Constitution was to sanction the republican system which it found established over these districts.

With the increasing population of the continent, the question of the power of Congress under the Constitution to admit new States, and acquire additional territory, grew in importance, and became a problem of great public interest.

The Constitution (Art. IV, Sec. 3) provides that:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures concerned, as well as of Congress.

This is the only reference to the subject in the instrument; and hence, to ascertain what new States come within the scope of this section, it is necessary to consult acknowledged authorities.

Story says:

> Although Congress has authority to admit new States into the firm, yet it is demonstrable that this clause had sole reference to the territory then belonging to the United States.

Mr. Pickering, Senator from South Carolina, one of the founders of the government, and the statesman from whom a large number of the provisions of the Constitution emanated, says, "that this provision of the Constitution only applied to new States from territory then possessed." It was announced by Mr. Webster, in the famous controversy of 1850, that he

> Had always entertained and often expressed the opinion that the formation of new States, or their adoption into the Union out of territory not belonging to the United States, was not in the contemplation of the Constitution of the United States; although it had seemed to be in the contemplation of the States of the old confederation, at least as far as regarded Canada. (Curtis' Life of Webster, p. 416.)

In 1811, Josiah Quincy made a violent speech against the admission of Louisiana, contending that the new States contemplated by the Constitution must be in the territory then held.

These authorities, taken in conjunction with those I shall introduce as to the absence of power in the government to acquire foreign territory, will establish the fact that the extension of the territorial limits beyond their original extent has been accomplished by a dangerously broad construction of the Constitution, if, indeed, the power exists at all.

The right to acquire foreign territory has been based upon either the section of the Constitution above quoted, or upon the treaty-making power, which is specifically mentioned among the powers of the government. It was laid down by the Supreme Court in the case of The American Insurance Co. *v.* Canter, 1 Peters, 511, that "the annexation of foreign States out of the

limits of the United States must be by the act of the treaty-making power." The annexation of the greater part of foreign territory has been in accordance with the principle enunciated in this case; Louisiana, Florida, Mexican territory and Alaska have been thus acquired. In the case of Texas, however, the decision in 1 Peters was entirely disregarded, and Congress, by a joint resolution under the power in the Constitution that "new States may be admitted," etc., admitted the foreign and independent State of Texas. "This," we are told in a note on page 279 of Kent's Commentaries, "was giving a new and legislative construction of enormous efficiency and extent to acquire foreign States, and would appear to be contrary to the principle of construction recognized by the Supreme Court."

Upon the question as to whether foreign territory could in any manner be acquired under the Constitution, there has been much diversity of opinion; the following authorities, among the highest on Constitutional law, will tend to establish the absence of such authority. And in discussing any constitutional principle, it must be rendered that "the government of the United States can claim no powers which are not granted to it by the Constitution," as stated by Chief Justice Marshall in the case, 1 Wheaton, 326, and as expressed in Article X of the amendments.

Judge Story tells us concerning the cession of any foreign territory, that:

> It is incredible that it should have been contemplated that any such overwhelming authority should be confided to the national government. * * * If it exists at all, it is unforeseen, and the result of a sovereignty intended to be limited and yet not sufficiently guarded.

With regard to the purchase of Louisiana, Thomas Jefferson, at the time President, was under the impression that it was unconstitutional, and needed an amendment; he wrote:

I confess I think it important in the present case to set an example against broad construction by appealing for new power to the people. If, however, my friends shall think differently, certainly I shall acquiesce with satisfaction, confiding that the good sense of our country will correct the evil of construction when it shall produce evil results.

Thus, Louisiana purchased for the public good, but at a sacrifice of principle, in turn became a precedent upon which succeeding legislation has been based, as we see from the words of Webster, who, after expressing his opinion, as given above, as to the formation of new States from foreign territory, said:

I wish to say in the next place, that after the acquisition of Louisiana I considered this a settled question and have always acted on it accordingly.

Alexander Hamilton wrote in the *Federalist:*

Congress has undertaken to do more; they have proceeded to form new states; to erect temporary governments; to appoint officers for them; and to prescribe conditions on which such states shall be admitted into the confederacy. All this has been done, and done without the least color of constitutional authority.

Pickering went so far on this subject as to express it as his opinion that an amendment authorizing the acquisition of foreign territory must emanate from and be approved by the people of every State; claiming that an amendment in the manner specified in Article V of the Constitution would not be valid, since the acquisition of foreign territory was entirely beyond the scope of the government.

Mr. Blaine, in his recent book, tells us that many men opposed the purchase of Louisiana as unconstitutional.

Chancellor Kent (p. 279, Vol. I) says:

The acquisition of the foreign territories of Louisiana and Florida by the United States by purchase, was to be supported only by a very liberal and latitudinary construction of the incidental powers of the government under the Constitution.

But whether rightfully or wrongfully, under the Constitution, foreign territory of vast extent has been annexed to the original domain. In chronicling the opinions of the distinguished statesmen and jurists previously quoted from, the writer is not forgetful of the fact that the right of acquisition has been sustained by authorities contra. Many feel that broad construction, dangerous in being unlimited, is usually wrongful, particularly where an instrument of such perfection is concerned, but all must agree that in the acquisition of this splendid country this error, if such, has been fruitful of good results.

The question of the manner of governing territory, after its cession, is one which, in view of the Constitution, the scope of government, and in the light of historical analogies, seems to admit of much less question. Is the power of Congress over the Territories limited or unlimited? If limited, to what extent?

The Territories must be under the dominion and jurisdiction of the Union, or be without any government; for the Territories do not when acquired become entitled to self government, and they are not subject to the jurisdiction of any State. They fall under the powers given to Congress by the Constitution. This was the doctrine and decision of the Supreme Court in the case of the Am. Ins. Co. *v.* Canter, 1 Peters. (Note p 428, Vol. I, Kent.)

But it must not be inferred that because a Territory cannot set up a government for itself, and because the action of Congress is required in order to effect this, that Congress has unqualified powers; for, as pointed out by Calhoun in his debate with Webster, the action of Congress is equally necessary in order to put in operation the provisions of the

Constitution relating to States. Granting, then, the power of Congress to legislate for the Territories, it becomes necessary to ascertain the origin of this power and its extent.

The only grant to Congress of exclusive legislative powers over territory, is found in the eighth section of Article I, as follows:

> To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptancy of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings.

The scope of this section is plainly marked out. It requires no elucidation; it is evident that it does not refer to the Territories.

We are told by Judge Cooley, in his Principles of Constitutional Law (p. 164), that the legislative power is based on that clause of Article IV of the Constitution which prescribes that:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

And in this view of the intent of the above clause, we find many excellent writers uniting. The case of the American Ins. Co. *v.* Canter, is usually referred to as the authority for this position. The language of Chief Justice Marshall, who delivered the opinion of the court in this case, is concerning the clause in question:

> In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States.

But it is pointed out by Chief Justice Taney, who gave the opinion of the court, in Scott *v.* Sandford, 19 Howard, that these words in 1 Peters, 511, follow those given above:

> Perhaps the power of governing a Territory belonging to the United States, which has not by becoming a State acquired the means of self government, may result, necessarily, from the facts that it is not within the jurisdiction of any particular State and within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from which the power is derived, the possession of it is unquestionable.

To which Chief Justice Taney adds:

> It is thus clear from the whole opinion that the court did not mean to decide whether the power was derived from the clause, or was the necessary consequence of the right to acquire territory. They do decide that the power in Congress is unquestionable, and in this we do entirely concur, and nothing will be found in this opinion to the contrary. The power stands on the latter alternative put by the court—the inevitable consequence of the right to acquire territory.

It is further stated that this is more clearly demonstrated by the fact that Mr. Justice Johnson, who decided the case at circuit, expressly gave it as his opinion there that the clause considered referred only to the territory then in the United States. Moreover, that he concurred fully in the opinion of the Supreme Court in whose deliberations he participated. Judge Taney says that it was not necessary for the court in the case mentioned, to consider this question.

As before stated, it is upon this case that those chiefly rely who hold that the right of Congress to legislate for the Territories, and to legislate to any extent within their discretion, rests upon the clause in question. And in Scott *v.* Sandford we have an almost unanimous opinion of the Supreme Court that such reliance is misplaced. To render it more

certain that the scope of the clause has been misunderstood, reference is made to the case of the U. S, *v.* Gratiot, 14 Peters, 537, in which it is held that "the term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands."

The proceedings of the Constitutional Convention of 1787, as given in the Madison Papers, contain the debates on the adoption of the various propositions for the new confederation. It is plain from a review of the discussion on the section containing the clause under consideration, that it was not intended that it should have the extensive scope claimed for it; since it appeared in a form of the section proposed by Gouverneur Morris, who succeeded in getting the rest of the matter of the section in acceptable language; the clause being offered without remark and accepted without debate. A condition of affairs entirely inconsistent with the extensive powers claimed under it. The entire debate had been upon the latter clause concerning the claims of the United States.

It is further stated by Judge Taney, in the opinion above referred to, that the "purpose of this clause was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before the league was dissolved." He points out that the language is not *any* territory or the *territories*, and that the enumeration of the powers of Congress is begun by giving that to sell, and adds, "and whatever construction may now be given to these words, everyone, we think, must admit that they are not the words usually employed by statesmen in giving supreme power of legislation," and calls attention to the difference between them and the grant of exclusive power concerning the District of Columbia.

Von Holst, the eminent author of the History of the Constitution, says of the clause, that only the territory is

meant such as the United States possessed at the time. (Vol. I, p. 188.)

It seems, then, indisputable that the clause of the Constitution authorizing Congress to "make all needful rules and regulations for the territory and other property of the United States" has no reference to any territory but that possessed by the government at the time it came into existence, consequently that any claim of jurisdiction over the Territories from this provision is not proven; and that if we would establish any right whatever, to say nothing of an exclusive and unlimited right, of Congress to legislate for the Territories, we must look elsewhere in our national Constitution. It will be in vain, however, that we search; since, excepting the two provisions considered, there is nothing in the instrument specifically conferring this power upon Congress.

But we have been told by the Supreme Court that the power of the government to acquire foreign territory by treaty is unquestionable, and that the power to govern territory thus acquired must follow. Admitting the first proposition, the other follows, logically. The question again presents itself, what is the extent of this power? The Constitution is silent upon the subject; we must look to "provisions and principles of the Constitution and its distribution of powers for rules and principles;" we are to study the genius of the government, and consult the history of its formation.

It is proposed to examine, first, the claim to exclusive jurisdiction; second, the correct theory of government.

We are told by Chancellor Kent, that:

> It would seem from these various congressional regulations of the Territories belonging to the United States, that Congress has supreme power in the government of them, depending on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the Constitution of the United States. * * *

If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon river, to the west of the Rocky Mountains, it would afford a subject of grave consideration what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent States; and in the meantime, upon the doctrine taught by the acts of Congress, and even upon the judicial decision of the Supreme Court, the colonists would be in a state of the most complete subordination, as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a natural tendency, as all proconsular governments have had, to abuse and oppression. (P. 430, Vol. I.)

And, in a note to the above, adds:

Cicero, in his oration for the Manilian law, c. 14, describes in glowing colors the oppressions and abuses committed by Roman magistrates, exercising cruel and military power in the distant provinces.

It will be seen that this distinguished jurist declares the system established by Congress, and sanctioned by judicial decision, to be at variance with the spirit of our institutions; and derives consolation from the fact that the discretion of Congress has hitherto been exercised in wisdom and good faith. It is a little singular that both this author and Judge Cooley should consider it necessary to state this latter fact; it looks much like an effort to extract some satisfaction from a state of affairs they feel to be radically wrong.

Judge Cooley, in his work before mentioned, declares that "the Constitution was made for the States, and not for the Territories"—a somewhat ambiguous statement, since, if

it means that the Territories are not within the contemplation of the Constitution, it may be asked where a government of strictly delegated power derived its authority to acquire and govern them? Or, if it means that the Territories are within the contemplation of the Constitution, but not protected by its provisions, it may be asked, if our revolutionary patriots fought for liberty in order that they might establish a despotism?

The author continues:

> It confers power to govern Territories, but in exercising this the United States is a sovereign dealing with dependent territory, according as in its wisdom shall seem politic, wise and just, having regard to its own interests as well as to those of the people of the Territories.

The tyrannical powers of an absolute despotism could scarcely be more succinctly defined than this. But he adds:

> It is *believed*, however, that the securities for personal liberty which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere, and that citizens of the Territories, as well as citizens of the the States, may claim the benefit of their protection. (P. 36.)

It must be admitted that "believed" in this connection, is a filmy support for the lives and liberties of over a million people. And yet the learned author but represents a favorite theory.

Bouvier's Law Dictionary states that:

> Congress possesses the power to erect territorial goverment within the territory of the United States; the power of Congress over such Territories is exclusive and universal, and their legislation is subject to no control unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions.

These statements are the embodiment of the views of the ultra broad constructionists.

It may be safely stated that a majority of the public men of the first years of the century considered the purchase of Louisiana unconstitutional; President Jefferson so regarded it. Public policy demanded the purchase; the Constitution was forgotten, and so the territorial question commenced its course outside of that admirable instrument, and has ever remained outside, and continued to depart farther from it. Jefferson left the evils of this unwise act to the good sense of succeeding generations for correction, but his words have been forgotten. Such evils are seldom corrected.

Judicial decisions by the highest court of the nation, and the opinions of eminent writers, may be produced to show that the unrepublican idea of the powers of Congress is not the only one.

Judge Story says:

> If the territory can be purchased, it must be governed, and a territorial government must be created; but where can Congress find authority in the Constitution to erect a territorial government?

If, then, there is no power to erect any government, there is certainly no power to erect a despotic government, one of unlimited powers.

Von Holst, p. 445, says:

> The United States have, outside of the Constitution, no legal relation. The relation of the Union to the Territories is therefore a legal relation in and under the Constitution, which is wholly independent of the legislation of Congress, of which it is in fact the basis.

It is here held that it is to the Constitution we must go to ascertain the scope of the power of the general government in this respect, in the absence of express provisions therein, the spirit thereof must prevail.

Chief Justice Taney, for nearly thirty years the highest judicial functionary in the United States, delivered the opinion of the Supreme Court in the famous case of Scott against Sandford, in the views of which the entire bench joined with but two exceptions. The decision, which involved the status of the negro under the Constitution, the rights of Congress over the Territories, and other interesting and important questions, was considered a victory for the slave States. The Constitution, before the recent amendments, nowhere forbade slavery, but in several provisions distinctly recognized the existence of it. The Constitution had been called "a covenant with death and an agreement with hell" by the late Wendell Phillips, an opinion in which abolitionists generally joined. The succeeding presidential election was contested by the abolitionists largely on their expressed intention of disregarding so much of this decision as relegated negroes to an inferior station. Their candidate, Abraham Lincoln, in his inaugural address, said:

> At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

It will thus be seen what a trivial position the Supreme Court occupies, except in times of public calm, when it is the pleasure of the government to consider it final and irrevocable. This opinion was discredited by the government officials and reversed by the war, but only so far as regards the negro. The logic of the decision concerning the Territories stands out just as clear, and its force remains equally as great to-day as on the day of its announcement, March 5th, 1856. No war has reversed it, no amendment expressing the will of the majority to change the Constitution

in this particular has been adopted or suggested. These facts are recalled by way of preface to those portions of the opinion which it is proposed to introduce, and which are not to be impugned by the statement that the decision in the Dred Scott case is of no effect.

The opinion in question was to the following effect, concerning the subject under discussion; the words are those of the reporter's head notes:

The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States, applies only to territory within the chartered limits of some one of the States, when they were colonies of Great Britain, and which was surrendered by the British government to the old confederation of the States in the treaty of peace. *It does not apply to territory acquired by the present Federal government by treaty or conquest from a foreign nation.*

The case of the Ins. Co, *v.* Canter (1 Peters, 511), referred to and examined, showing that the decision in this case is not in conflict with that opinion, and that the court did not, in the case referred to, decide upon the construction of the clause of the Constitution, above mentioned, because the case before them did not make it necessary to decide the question.

Also:

3. The United States, under the present Constitution, *cannot acquire territory to be held as a colony to be governed at its will and pleasure.* But it may acquire territory which at the time has not a population that fits it to become a State, and may govern it as a Territory, until it has a population which, in the judgment of Congress, entitles it to be admitted as a State of the Union.

4. During the time it remains a Territory, *Congress may legislate over it, within the scope of its Constitutional powers in relation to citizens of the United States,* and may establish a Territorial government, and the form of this local government must be regulated by the discretion of Congress, but with powers *not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States, in respect to those rights of person or right of property.*

Here, then, we have a most solemn enunciation of the power of our national legislature over the Territories concurred in, with two exceptions, by all of the judges of the Supreme Court of the United States. We find those powers to be thus limited—the United States cannot acquire territory to be governed at its will and pleasure; nor can it exceed those powers which Congress itself may exercise over the citizens of the United States, concerning the rights of person or property. In the words of Judge Jere. S. Black,

> I do not assert that they can govern themselves in a way forbidden by the Federal Constitution, or by an act of Congress passed in pursuance thereof. The people of a State cannot do that. What I do assert is that Congress cannot legislate for a Territory on any subject matter on which it cannot legislate for a State. This furnishes an easy and infallible test of constitutionality. (Federal Jurisdiction in the Territories, p. 15.)

As stated before, the case in the first of Peters is universally quoted by those who claim despotic powers for the Federal government over the Territory. It has already been shown that the statement made in this decision concerning the scope of the clause in the fourth article, is usually misconceived; there is but one other sentence of the opinion that seems to sustain the unrepublican theory, viz:

> In legislating for them [the Territories] Congress exercises the combined powers of the general and of a State government.

This was also considered by the court in Scott *v.* Sandford; the opinion in the case points out that the question had been as to the lawfulness of an admiralty court at Key West, established by the legislature of the Territory of Florida, under its power over all rightful objects of legislation. The Supreme Court distinctly stated the question before it to be, "it has been argued that Congress cannot vest admiralty

jurisdiction in courts created by Territorial legislatures." It then shows that the courts were mere legislative and not constitutional courts, and Congress might delegate the power to establish them to the Territorial government; and concludes:

> Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a State government—meaning that the discretionary power of the State government is shown in giving the judges appointments for terms of years only—that of the general government in investing these courts with admiralty jurisdiction.

The Chief Justice further adds:

> The question as to what courts Congress may ordain or establish in a Territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different. And we are satisfied that no one who reads attentively the pages in Peters' reports, to which we have referred, can suppose that the attention of the court was drawn for a moment to the question now before this court. (P. 447.)

And further:

> There is no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a Territory thus acquired, *the Court must necessarily look to the provisions and principles of the Constitution and its distribution of powers for rules and principles* by which its decisions must be governed.

In the absence of express regulation of the power of Congress over the citizens of a Territory, we must not forget the words of the tenth article of the amendments—that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people. Here, then, is an express limitation of the power of Congress.

We are told by Chief Justice Marshall that:

> The distinction between a government of limited and unlimited powers is abolished, if these limits do not confine the persons on whom they are imposed.

Von Holst, p. 446, says:

> And equally incontestable is it * * * that the powers of the Federal government, with regard to the persons and property of the citizens of the Territories, cannot be other than those granted it over the citizens of the States.

If any doubt could remain as to the restricted powers of Congress over the Territories, it would seem clear that in the cases of those ceded by Mexico such doubt must vanish, in view of the treaty of peace, signed May 30, 1848, in Article IX of which it is provided that the people of the ceded territory "shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion, without restriction."

It is claimed that the foregoing discussion establishes the following principles:

1. Upon the acquisition of foreign territory, not admitted at once in the Union as a State or States, it is the duty of Congress to give the people thereof a charter. "But," in the strong words of Judge Black, "the charter must be a free one. If it abridges the liberty of the people to do as they please about matters which concern nobody else it is void."

2. That the people of such Territory, having secured a charter or organic act, have, under the Constitution, the same exclusive right of local legislation possessed by citizens of a State.

"If there be anything fixed, established and undeniable

as a proposition of public laws, it is the national right of a free community like Utah to govern itself. It is impossible for a member of Congress not to know that the success of our revolution was an acknowledged triumph of that principle," are additional words of that eminent jurist, Judge Black.

Any other conclusion would lead to absurdities and to despotism. There is not a candid American who will claim, upon a moment's reflection, unlimited power, in this respect, for the general government. Such a principle established would put it in the power of Congress to do anything with the Territories—to establish over them a despotic tyranny, in comparison with which Russia would be the whitest republicanism.

If it is claimed that Congress, in legislating for these satrapies, has unlimited power, except that it must observe the right of person and property enumerated in the Constitution, there is still left a general government claiming to exercise the same powers over its subjects in the Territories against which the colonists protested to the extent even of revolution. We still have a government which may prohibit slavery in the Territories, and as a necessary result enforce it there; one which may prohibit polygamy in the Territories, and as an inevitable consequence establish it there, a government which in Utah has given one-half of the jurors to one-tenth of the population; disfranchised thousands of citizens without trial; made *ex post facto* laws, and which now proposes to rob women of the vested right of suffrage; to confiscate the property of a private corporation, and even suggests the substitution of a commission for the government of that Territory, in place of the Legislature.

To-day it is polygamy and the alleged union of church and state which Congress presumes to crush; to-morrow it may be the political creed of some of the Territories which excites its animosity. If Congress has power to legislate at all on the marriage question, it may go to any limit; if one of

the Territories has established strict laws concerning divorce, and of which they feel justly proud, it is entirely within the scope of the assumed powers of Congress to replace them by regulations destructive of the family and society. If they may prescribe that one-tenth of the population may furnish one-half of the jurors, it is only an application of the same principle that they should empower one man to choose them all. If they may rob women of the privilege of voting, they may likewise take it away from men. If they may confiscate the property of a corporation, they may rob an individual. If they may prescribe that a commission, upon satisfactory evidence to them, may issue a warrant of attachment for an alleged witness, who in practice may not be *bona fide* such, once in a hundred times, and hold him not to exceed ten days, they may prescribe that he may likewise be held not to exceed ten years—a convenient method of disposing of obnoxious people. They may foist the dram shop upon a temperance community; they may license prostitution in a moral one. It is the Mormons this year—it may be the Catholics next.

It may be stated, that whatever may be the ideas of Congress, concerning its own powers, they have usually been exercised wisely and with an earnest desire for the welfare of the Territories; republican charters have been granted to them, and their local affairs have, as a rule, been left to themselves. This is what they have done, except in the case of Utah; but the alarming fact exists that their enormous enslaving power has only been sleeping. What they might have done depended, or what they may yet do depends only upon the will and pleasure of Congress. It is only by the strong efforts of statesmen and the unswerving fidelity of courts, that past wrongs may be corrected, and future evils rendered impossible.

Congress has been urged to supersede the Legislature of Utah by a commission appointed by the President. The early government of the Northwestern Territory and Louisiana are

cited as precedents. Concerning the former, the commission referred to was created by the Congress of the old Confederation. The plan of government thus adopted, being satisfactory to the people, was perpetuated under the power of Congress to make needful rules and regulations for the government of territory then belonging to the United States. As pointed out by Judge Taney,

> The power which Congress may have lawfully exercised in this Territory * * can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal government. (Scott *v.* Sandford, 19 Howard.)

Moreover, the nature of the government was as follows:— The governor and judges were to *select* and adopt in the districts such laws of the original States as were best suited to their circumstances; and report the same to Congress. This was the provision for the districts until there should be five thousand male inhabitants of full age; then the government was vested in a governor, appointed by the President, a council of five members to be selected from ten names submitted by the house of repesentatives of each district, and a house of representatives elected by the people, with a further assurance of admission upon reaching a population of sixty thousand. Thus, it is seen that the powers of the first government are limited to selecting suitable laws; it had no legislative power and was ephemeral, the succeeding government was representative. Again, these colonies were assured, in their charters, religious freedom; the privilege of the *habeas corpus;* trial by jury; proportional representation in the legislatures; the principles of the common law; bail in all cases except capital offenses; moderate fines, and that no man should be deprived of liberty or property except by judgment of his peers.

In the case of Louisiana, the temporary government by the commission lasted but a year; the object of establishing it was

to give an opportunity of finding out something of the geography and people; the latter were French and Spanish, and little known by the people of the United States. It will be found that when it was alleged in Congress that the temporary government given to Louisiana was a new thing in the United States and opposed to the Constitution and the treaty, it was answered that the government was justified because the people differed materially from those of the United States; were unacquainted with the principles of the government; that information from an authentic source had been received that the provisions of our institutions were inapplicable to them, and it was a short time only, perhaps a year. One speaker said the most ridiculous idea was that these people were to be kept in slavery until taught to think and behave like freemen. The question to be determined was, "are the people of Louisiana capable of self government?" It was decided that they were not then, and for this reason alone was the temporary commission, without legislative powers, extended over them. In a year it was supplanted by a representative government.

Those who appeal to these as precedents, must be prepared to accept them as such entirely; in both cases the reasons for the commission were lack of population and preparation; hence they would fail as precedents except under similar circumstances.

No less distinguished writer than Judge Cooley has compared the relation of the Territories and the general government to that of a city or town of the States; and has argued from the power of States to shape municipal governments to that of Congress to take care of the Territories. The comparison seems to be fallacious; the inhabitants of a city within a State are entitled to all the rights and privileges of any citzien of the State; when they ask for a charter, they ask for what they know is a further advantage to them; they desire it; they receive benefit from it; it robs them of no privileges; it adds

to them safety and happiness. The same author informs us that Congress is limited only by its discretion in dealing with the Territories; they have no rights; Congress measures out to them as many privileges as it thinks proper; the author *believes* the securities for personal liberty in the Constitution to be as much for the benefit of citizens of the Territories as for those of the States. There is a wide difference between the desired "pupilage" of the city with the possession of every right of a freeman, and the enforced absolutism of a Territory with hazy rights and doubtful privileges.

It is now proposed to consider briefly those wrongs of the colonies against which they so manfully and urgently protested, and which, unredressed, ultimately gave birth to American independence. Before doing so, however, it may be well to understand what differences there are, if any, between the dependence of the Territories and the dependence of the colonies. Judge Cooley finds several differing features "which are important, indeed vital. The first of these is that the territorial condition is understood under the Constitution to be merely temporary and preparatory, and the people of the Territory while it continues are assured of the right to create and establish State institutions for themselves so soon as the population shall be sufficient and the local condition suitable; while the British colonial system contained no promise or assurance if any but a dependent government continually." In answer to which it may be said that whether or not the conditions are suitable depends upon the pleasure of Congress. Let the politics of Congress and the Territory be opposed for fifty years, and it is entirely probable it will remain a Territory for that length of time. Let it contain a predominant Spanish population, as New Mexico, and this may be urged and accepted as a sufficient reason to keep the Territory forever out of the Union. Let the "Mormons" abandon polygamy, it will be claimed that the Church is dominant; let them abandon and disorganize the Church,

and a secret understanding will be claimed; what then does the promise of statehood amount to? The British colonies are infinitely freer to-day that the American Territories.

> The second is that the people of the American Territories are guaranteed all the benefits of the principles of the Constitutional right which protect life, liberty, and property; * * * while in the colonies those principles were the subject of dispute, and, if admitted, would be within the control of an absolute imperial legislature which might overrule them at will.

Are the citizens of Territories guaranteed these rights? The author on the preceding page, says, "it is believed" they are; the Edmunds bill claims exclusive jurisdiction for Congress over the Territories; and it has been seen that many believe, the majority perhaps, that Congress is only limited by its discretion and pleasure. It would be difficult to believe that Parliament was bound by less stringent rules.

The third difference is that the Territories have the right of local taxation; the government only taxing them to realize sufficient revenue to repay what is expended for them. Yet the Territories would be taxed equally the same even if they should protest; and it was against taxation without consent that the colonists waged war. What is to prevent Congress under its assumed powers from taxing the Territories to any extent? Nothing.

The Congress of 1774, participated in by Washington, Adams, Jay, Henry, and other patriots, adopted the following:

> Can the intervention of the sea that divides us cause disparity of rights, or can any reason be given why English subjects who live three thousand miles from the royal palace, should enjoy less liberty than those who are three hundred miles from it. Reason looks with indignation on such distinctions, and freemen can never perceive their propriety; and yet however chimerical and unjust such discriminations are, the Parliament assert that they have a right to bind us in all cases without exception.

Know then that we consider ourselves and do assert that we are and ought to be as free as our fellow subjects in Britain.

These are the sentiments of the men who hewed out independence for these United States; could more apt ones be chosen by the citizens of a Territory in pleading their cause?

Apropos of the proposition to govern Utah by a commission, here are a few historical statements respectfully submitted to the gentlemen who urge such measures. There is no instance of a colony settled in America without a representative assembly of the people, nor any attempt to deprive the colonies of this privilege except in the arbitrary reign of James II; and this attempt led to the passing of resolutions insisting on the right of representation; which right existed in every colony at the time of the revolution.

The colonists denied the supremacy of the legislative powers of Great Britain, and insisted that they themselves possessed the power of local legislation. The colonial judiciary sanctioned this position. It was agreed, however, that in such acts as were for the general welfare, or which regulated commerce or intercourse with foreign countries or the mother country, Parliament had jurisdiction. The Colonial Congress which met in September, 1774, set forth their grievances in language so appropriate to the present state of affairs existing in the Territories of the United States, that copious extracts from their petitions are introduced:

Resolved: I. That they are entitled to life, liberty and property, and have never ceded to any sovereign power whatever, a right to dispose of either without consent.

II. That our ancestors were at the time of their emigration from the mother country entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England.

III. That by such emigration, they have neither forfeited, surrendered nor lost any of these rights.

IV. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative councils. * * * And as the English colonists are not represented and from their local and other circumstances cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of legislation can only be preserved in all cases of taxation and internal policy, subject only to the negative of their sovereign.

V. That, therefore, the exercise of legislative power in severa colonies, by a council appointed during the pleasure of the crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

In the address to the House by the same Congress the following occurs:

Had our Creator been pleased to give us existence in a land of slavery the sense of our condition might have been mitigated by ignorance and habit. But thanks be to His adorable goodness, we were born the heirs of freedom and ever enjoyed our right under the auspices of your royal ancestors. * * * Your majesty, we are confident, justly rejoices that your title to the crown is thus founded in the title of your people to liberty.

The above quotations are submitted without remark; it would be unnecessary to point out the obvious parallelism of the grievances and claims of the colonists and those of the citizens of the Territories.

The Revolution was fought not so much on account of the hardships which the colonists suffered from the tyranny of Great Britain, as on account of the principle involved in a submission to trivial excesses of power, which might lead to despotism. It was not that the taxes imposed were burdensome, because they were light; it was, as stated by Washington, because the same authority which could impose a small tax could rob the colonists of their last shilling. It was, then, chiefly upon the claim and denial of the principle of local self-government that the revolution was fought, and if the result of that long

contest settled any principle definitely, it was the right of a free community to legislate for itself on local affairs. The result of that war was a triumph of human rights. The Declaration of Independence had pronounced that all men "are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness." Liberty is consistent only with local self-government; to be ruled by a distant power is to be subjected to laws passed contrary to your desires and in ignorance of your situation. The result of the war of independence was the Constitution of the United States, in every part of which is stamped the ideas of local jurisdiction, the general government only possessing such power under it as is necessary for the public good and general welfare, and being expressly limited in its jurisdiction to those powers granted to it; all rights not granted being expressly reserved to the States respectively or to the people. The colonists fought for local legislation; they were victorious; the Constitution was formed in accordance with the idea; exclusive authority over the Territories is nowhere granted in that instrument. The colonists contended for this principle with a government without a written constitution, whose Parliament is supreme and subject only to the check of a popular insurrection. We contend for local legislation with a government of strictly delegated powers, and which is the creature of the very idea it now opposes. Moreover, Congress has opened the Territories for settlement, it sells land to settlers and invites people from the States as well as from other parts of the world to purchase, and extends to all the benefits of a free government.

It is vain to argue that citizens of the United States lose the rights, or that citizens of other countries do not gain the rights of freemen under such circumstances. Great Britain recognized two kinds of colonies; first, the settled, in which citizens possessed the rights of Englishmen; and, second, the Crown, or conquered, in which people settled with the under-

standing that their privileges were at the discretion of Parliament.

If, then, our government refuses to grant citizens of the Territories those rights to which the Constitution and our history entitle them, the precedents of our colonial days must prevail, and the uniform practice of the British government in granting to those people who settled in colonies which had been thrown open for settlement by the government the rights of British citizens, should impel Congress to grant to settlers in our western Territories the rights of United States citizens, with all that the right means.